

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHRISTOPHER ALPHANSO  
THOMPSON

v.

JANET RENO, et al.

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CIVIL ACTION

NO. 99-CV-5551

**MEMORANDUM**

**Padova, J.**

**April 5, 2000**

Petitioner, Christopher Alphanso Thompson, filed the instant Petition for Habeas Corpus pursuant to 28 U.S.C. § 2241 raising several constitutional issues related to his removal and seeking review of the Board of Immigration Appeals' decision not to reopen his appeal.<sup>1</sup> For the following reasons, the Court denies the Petition.

Section 2241 of Title 28 of the United States Code allows district courts to grant writs of habeas corpus where a prisoner is in custody in violation of the Constitution or other federal law.<sup>2</sup>

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<sup>1</sup>This Court acknowledges the recent decisions by the United States Court of Appeals for the Third Circuit which require district courts to forewarn pro se habeas petitioners of the restrictions on successive petitions and the new statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (1996). See Mason v. Meyers, No. 98-7078, 2000 WL 291160, at \* 2 (3d Cir. Mar. 20, 2000); United States v. Miller, 197 F.3d 644, 652 (3d Cir. 1999). Because aliens filing for habeas corpus pursuant to 28 U.S.C. § 2241 (1994) face no similar bar on second or successive petitions, the Court concludes that the notice requirement imposed by Miller and Mason does not apply to Petitioner's case.

<sup>2</sup>28 U.S.C. § 2241 provides in pertinent part:

The writ of habeas corpus shall not extend to a prisoner unless --

28 U.S.C. § 2241 (1994). Section 2241 has traditionally been the vehicle by which aliens held in government custody have challenged their detention, deportation proceedings, and other administrative decisions. See Heikkila v. Barber, 345 U.S. 229, 234-35 (1953). Because Petitioner's removal proceeding commenced after April 1, 1997, the permanent rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub.L. No. 104-208, 110 Stat. 3009 (1996), and the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (1996), apply to his case. This Court has jurisdiction over the instant Petition pursuant to Liang v. Immigration & Naturalization Service, Nos. 99-5053, 99-5327, and 99-6039, 2000 WL 264216, at \*7-8 (3d Cir. Mar. 9, 2000).

## **I. BACKGROUND**

Petitioner is a native and citizen of the United Kingdom. He was admitted to the United States as a permanent resident in 1970. In May of 1988, Petitioner was convicted of the criminal sale of a controlled substance in the fifth degree in violation of section 220.31 of the New York State Penal Law. In April of 1999, the Immigration and Naturalization Service ("INS") commenced removal proceedings against Petitioner pursuant to Immigration and Naturalization Act ("INA") section 237(a)(2)(A)(iii), codified at 8 U.S.C. § 1227(a)(2)(A)(iii)<sup>3</sup>, and INA § 237(a)(2)(B)(i),

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(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

...

(3) He is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2241(c) (1994).

<sup>3</sup>8 U.S.C.A. § 1227(a)(2)(A)(iii) (West 1999) permits the removal of aliens convicted of aggravated felonies.

codified at 8 U.S.C. § 1227(a)(2)(B)(i)<sup>4</sup>. On May 11, 1999, an Immigration Judge ordered Petitioner removed. Petitioner filed a timely Notice of Appeal with the Board of Immigration Appeals (“BIA”), but failed to file a supporting memorandum of law allegedly because he never received a briefing schedule or transcripts of his removal proceedings. On October 4, 1999, the BIA dismissed Petitioner’s appeal on the merits based on the issues raised in the Notice of Appeal. The BIA found that the evidence of Petitioner’s prior conviction established removability by clear and convincing evidence, and pronounced Petitioner ineligible for a waiver of inadmissibility pursuant to INA section 212(c), codified at 8 U.S.C. § 1182(c). The BIA declined to rule on Petitioner’s constitutional challenge to the application of IIRIRA and AEDPA to his case as outside its jurisdiction. Petitioner subsequently filed a Motion to Reconsider with the BIA and the instant Petition with this Court. While the Petition was pending, the BIA denied Petitioner’s Motion to Reconsider.<sup>5</sup>

## **II. DISCUSSION**

The instant Petition raises four issues. Petitioner first argues that the application of the AEDPA and IIRIRA amendments to the INA to his case is impermissibly retroactive because his convictions precede the effective date of both acts. Second, Petitioner claims that section 212(c) of the INA violates the Equal Protection Clause of the Fifth Amendment by distinguishing between permanent residents convicted of aggravated felonies and other aliens similarly convicted of

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<sup>4</sup>8 U.S.C.A. § 1227(a)(2)(B)(i) (West 1999) provides that any alien convicted of a crime relating to a controlled substance, other than a single offense involving possession of 30 grams or less of marijuana for personal use, is deportable.

<sup>5</sup>Normally, aliens are required to exhaust their administrative remedies prior to filing a petition for habeas corpus in federal court. Marrero v. INS, 990 F.2d 772, 778 (3d Cir. 1993). In light of the BIA’s intervening denial of Petitioner’s Motion, the Court will resolve the Petition since his administrative remedies are now exhausted.

aggravated felonies but who are not permanent residents. Last, Petitioner asserts that the BIA violated his rights to due process of law under the Fifth Amendment by dismissing and refusing to reopen his appeal without providing him the opportunity to file a supporting memorandum of law. The Court will address each argument in turn.

A. Retroactivity

Petitioner challenges two different aspects of the AEDPA and IIRIRA amendments as impermissibly retroactive. First, Petitioner argues that because his conviction predates the effective date of AEDPA section 440(d) that amends INA section 212(c), the new INA section 212(c) may not be applied to preclude him from seeking a discretionary waiver of inadmissibility. Under the former section 212(c) of the INA, codified at 8 U.S.C. § 1182(c) (repealed 1996), aliens seeking to avoid deportation based on criminal convictions could apply to the Attorney General for a discretionary waiver of inadmissibility. See DeSousa v. Reno, 190 F.3d 175, 178-79 (3d Cir. 1999). AEDPA section 440(d) amended section 212(c) of the INA to preclude removable aliens who have been convicted of an aggravated felony from receiving a waiver of inadmissibility. See AEDPA § 440(d); DeSousa, 190 F.3d at 179. The Court of Appeals for the Third Circuit has considered the question Petitioner poses and held that section 212(c) as amended does not have a retroactive effect. DeSousa, 190 F.3d at 187. Under DeSousa, therefore, Petitioner's argument fails.

Secondly, Petitioner asserts that classifying his 1988 conviction as an aggravated felony pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii) constitutes an unlawful retroactive application of AEDPA and IIRIRA and violates the Ex Post Facto Clause. The Third Circuit has also considered and rejected this argument. Scheidemann v. INS, 83 F.3d 1517, 1523-26 (3d Cir. 1996). Petitioner's arguments regarding the retroactive effect of the AEDPA and IIRIRA amendments are, therefore, without merit. The Court concludes that Petitioner is not entitled to habeas corpus relief on either

of these grounds.

B. Equal Protection

Petitioner next argues that the AEPDA and IIRIRA amendments to section 212(c) violate his right to equal protection of the law by distinguishing between permanent and nonpermanent aliens who have been convicted of aggravated felonies. The Court of Appeals for the Third Circuit has addressed this argument and held that INA section 212(c) as amended does not violate aliens' rights to equal protection under the law. DeSousa, 190 F.3d at 185. For this reason, Petitioner is not entitled to habeas relief on this ground.

C. BIA's Dismissal of Petitioner's Appeal and Denial of Reconsideration

Lastly, Petitioner requests this Court review the BIA's dismissal of his appeal and denial of his motion for reconsideration. Although Petitioner frames his argument based on the original dismissal of his appeal as a denial of due process on the grounds that he did not receive a briefing schedule or transcripts of his removal proceedings, construing the Petition liberally, the Court concludes that Petitioner also challenges the BIA's denial of his motion to reconsider issued subsequent to the filing of the instant Petition.

Petitioner argues that the BIA's failure to transmit the briefing schedule and transcripts prevented him from timely filing an appellate brief and violated his rights to due process. Aliens are entitled to due process of law in removal proceedings pursuant to the Fifth Amendment. Reno v. Flores, 507 U.S. 292, 305 (1993). To prevail on a due process claim, the petitioner must demonstrate that his rights were violated by defects in the underlying removal proceeding, and he suffered prejudice as a result of the defects. United States v. Ayeni, 66 F. Supp. 2d 617, 621 (M.D.Pa. 1999)(citing United States v. Zarate-Martinez, 133 F.3d 1194, 1197 (9th Cir. 1998)). To demonstrate prejudice, the Petitioner must offer "plausible grounds of relief which might have been

available to him but for the deprivation of rights.” Zarate-Martinez, 133 F.3d at 1198. Petitioner claims he was prejudiced since he wanted to raise additional arguments in his brief that were omitted from his Notice of Appeal. Assuming without deciding that Petitioner states a deprivation of rights, the Court finds that Petitioner suffered no prejudice in the BIA’s dismissal of his appeal. The BIA reviewed the record of his removal proceedings and affirmed the Immigration Judge’s decision on the merits. Furthermore, Petitioner has not specifically identified any “plausible grounds of relief” that would have been otherwise available to him. Therefore, the Court will not grant habeas relief on this ground.

The Court further concludes that Petitioner is not entitled to habeas relief based on the BIA’s denial of his motion to reconsider. Courts review BIA refusals to reconsider under an abuse of discretion standard. INS v. Abudu, 485 U.S. 94, 110 n.15 (1988); Nocon v. INS, 789 F.2d 1028, 1033 (3d Cir. 1986). Based upon the opinion rendered by the BIA, the Court cannot conclude that the BIA abused its discretion in denying Petitioner’s motion.

Having disposed of all of Petitioner’s grounds for relief for the foregoing reasons, the Court denies the Petition. An appropriate Order follows.

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**ORDER**

**AND NOW**, this day of March, 2000, upon consideration of Petition for Writ of Habeas Corpus (Doc. No. 1), and Respondent's Motion to Dismiss (Doc. No. 5), **IT IS HEREBY ORDERED** that Respondent's Motion is **GRANTED**.

BY THE COURT:

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John R. Padova, J.